TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 423

PAUL F. BRUNING, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 30, 1963
CERTIORARI GRANTED NOVEMBER 18, 1963

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. .....

PAUL F. BRUNING, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant.

COMPLAINT

And Now comes Paul F. Bruning, by his attorney, James G. Marks, Jr., and brings this action against the United States of America upon a cause of action whereof the following is a statement:

1. The Jurisdiction of this Court is furnished by Section 1346 (a) (1) of the Judicial Code, 28 U.S.C. 1346 (a) (1), and this action arises under Section 7422 of the Internal Revenue Code of 1954.

2. Plaintiff is an individual residing in the City of Altadena, County of Los Angeles, State of California.

3. On or about January 31, 1952, the United States of America made an assessment of $4,395.42 against taxpayer for withholding and F.I.C.A. taxes for the fourth quarter of 1951.

[fol. 2] 4. On July 1, 1953, taxpayer filed a voluntary petition in bankruptcy in the Western District of Louisiana, Lake Charles Division. At the time of filing said voluntary petition in bankruptcy taxpayer was indebted to the United States in the aforesaid amount of $4,395.42 covering withholding and F.I.C.A. taxes assessed for the fourth quarter of 1951.

5. Taxpayer was ultimately adjudged a bankrupt but the indebtedness to the United Stafes was not discharged.

6. On May 13, 1958 final payment on account of said assessment of $4,395.42 was made by taxpayer by means

of the crediting to the delinquent account by the Director of Internal Revenue, Pittsburgh, Pennsylvania, of a refund determined to be due taxpayer for income taxes of a year subsequent to taxpayer's adjudication as a bankrupt.

7. Concurrently with the application of the refund of the delinquent account, the United States assessed accrued interest of $1,369.42, which covered the period from the date of the assessment, January 31, 1952, to the date of final payment, March 13, 1958, after giving proper credits for payments previously made on account. Said assessment of interest was paid by a credit of a portion of the refund determined to be due taxpayer for income taxes of a year subsequent to taxpayer's adjudication as a bankrupt.

[fol. 3] 8. On or about June 19, 1959, taxpayer filed a Claim for Refund with the Director of Internal Revenue, Pittsburgh, Pennsylvania for $995.81, representing the interest assessed against taxpayer with respect to the assessment of withholding and F.I.C.A. taxes of $4,395.42, which interest accrued subsequent to July 1, 1953, the date on which taxpayer filed his voluntary petition in bankruptcy. Said assessment of accrued interest is unlawful for the reason that the United States is not entitled to interest after the filing of the petition in bankruptcy.

9. On the basis of plaintiff's Claim for Refund plaintiff is entitled to a refund of $995.81.

10. The Claim for Refund was disallowed in full by the District Director of Internal Revenue and notice of such disallowance was given plaintiff by registered mail on November 23, 1959.

11. The United States of America is now wrongfully and unlawfully withholding from plaintiff without his consent and against his will, the above amount of $995.81, with interest thereof from the 13th day of May, 1958.

[fol. 4] Wherefore, the plaintiff prays for judgment against the United States of America in the sum of $995.81, with interest from the 13th day of May, 1958.

Attorney for Plaintiff.

[fol. 5] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
No. 561-60 WB (Civil)

PAUL F. BRUNING, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

FIRST AMENDED COMPLAINT (FOR RECOVERY OF FEDERAL TAXES)—Filed June 27, 1960

Plaintiff complains of the Defendant and alleges:

I.

This is an action for the recovery of interest on withholding and FICA taxes alleged to have been wrongfully, erroneously and illegally collected from the plaintiff by the defendant for the period subsequent to July 1, 1953, the date on which plaintiff filed a voluntary petition in bankruptcy, [fol. 6] to the date of final payment, March 13, 1958, and is brought under the jurisdiction conferred upon this Court by 28 U.S.C.A. 1346(a)(1).

II.

Plaintiff is an individual residing in the City of Altadena, County of Los Angeles, State of California.

III.

Defendant is a corporate and sovereign body politic.

IV.

On or about January 31, 1952, the United States of America made an assessment of $4,395.42 against taxpayer for withholding and FICA taxes for the fourth quarter of 1951.

V.

On July 1, 1953, taxpayer filed a voluntary petition in bankruptcy in the Western District of Louisiana, Lake Charles Division. At the time of filing said voluntary petition in bankruptcy taxpayer was indebted to the United States in the aforesaid amount of $4,395.42 covering withholding and FICA taxes assessed for the fourth quarter of 1951.

VI.

Taxpayer was ultimately adjudged a bankrupt but the indebtedness to the United States was not discharged.

VII.

On May 13, 1958 final payment on account of said assessment of $4,395.42 was made by taxpayer by means of the [fol. 7] crediting to the delinquent account by the Director of Internal Revenue, Pittsburgh, Pennsylvania, of a refund determined to be due taxpayer for income taxes of a year subsequent to taxpayer's adjudication as a bankrupt.

VIII.

Concurrently with the application of the refund of the delinquent account, the United States assessed accrued interest of $1,369.42, which covered the period from the date of the assessment, January 31, 1952, to the date of final payment, March 13, 1958, after giving proper credits for payments previously made on account. Said assessment of interest was paid by a credit of a portion of the refund determined to be due taxpayer for income taxes of a year subsequent to taxpayer's adjudication as a bankrupty (sic).

IX.

On or about June 19, 1959, taxpayer filed a Claim for Refund (copy of said Claim for Refund is attached marked Exhibit "A") with the Director of Internal Revenue, Pittsburgh, Pennsylvania for $995.81 representing the interest assessed against taxpayer with respect to the assessment of withholding and FICA taxes of $4,395.42, which interest accrued subsequent to July 1, 1953, the date on which taxpayer filed his voluntary petition in bankruptcy. Said assessment of accrued interest is unlawful for the reason that the United States is not entitled to interest after the filing of the petition in bankruptcy.

[fol. 8]

X.

The Claim for Refund (copy of disallowance is attached hereto marked Exhibit "B") was disallowed in full by the District Director of Internal Revenue and notice of such disallowance was given plaintiff by registered mail on November 23, 1959.

XI.

No part of the sum of $995.81 alleged to have been erroneously, wrongfully and illegally collected from plaintiff by the defendant has been repaid, credited or refunded to plaintiff or to anyone for its use. Said sum with interest thereon as provided by law remains outstanding and unpaid to plaintiff by the defendant.

Wherefore, the plaintiff prays for judgment against the United States of America in the sum of $995.81, with interest from the 13th day of May, 1958.

Ernest R. Mortenson, Attorney for Plaintiff

Dated: 23 day of June, 1960.

[fol. 9]

EXHIBIT A TO FIRST AMENDED COMPLAINT

Form 843
(Rev. Mar. 1960)

U. S. TREASURY DEPARTMENT—INTERNAL REVENUE SERVICE

CLAIM

To Be Filed With The District Director Where Assessment Was Made Or Tax Paid

District Director's Stamp
(Date received)

The District Director will indicate in the block below the kind of claim filed, and fill in, where required.

☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Please Type or Print Plainly

Name of taxpayer or purchaser of stamps
Paul F. Bruning
Number and street
c/o James G. Marks, Jr., Esq.
1707 Oliver Building
City, town, postal zone, State
Pittsburgh, Pennsylvania

Fill in applicable items—

Attach letter size sheets if space is not sufficient

1. Social security number .....

2. If an employer, enter employer identification number .....

3. District in which return (if any) was filed 23rd Pa.

4. Name and address shown on return, if different from above Paul F. Bruning
812 Washington Avenue, Oakmont, Pennsylvania

5. Period—if for tax reported on annual basis, prepare separate form for each taxable year From ....., 19...., To ....., 19....

6. Kind of tax
Interest on Withholding and F.I.C.A. taxes

7. Amount of assessment $1,369.42
Dates of payment 3-13-58

8. Date stamps were purchased from Government
.....

9. Amount to be refunded $995.81

10. Amount to be abated (not applicable to income, estate, or gift taxes) $.....

11. The claimant believes that this claim should be allowed for the following reasons: SEE RIDER ATTACHED

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Signed PAUL F. BRUNING
by James G. Marks, Jr.
Attorney in fact

Dated June 18, 1959

INSTRUCTIONS

1. The claim must set forth in detail each ground upon which it is made and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. If a joint income tax return was filed for the year for which this claim is filed, enter social security and employer

identification number, if any, of both husband and wife and each must sign this claim even though only one had income.

3. Whenever it is necessary to have the claim executed by an agent on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent to sign the claim on behalf of the taxpayer shall accompany the claim.

4. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

5. Where the taxpayer is a corporation, the claim will be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

6. If claim is for excess social security (F.I.C.A.) tax withheld as a result of having had more than one employer, include the names and addresses of your employers, and the amount of wages received and taxes withheld by each as part of your explanation in item 11. Do not claim tax withheld if you have claimed the excess withholding on your individual income tax return.

Form 843 (Rev. 3-60)

[fol. 10] RIDER

9. Taxpayer filed a voluntary Petition in Bankruptcy in the Western District of Louisiana, Lake Charles Division, on July 1, 1953. On said date Taxpayer was indebted to the United States in the sum of $4,395.42 for

Withholding and F.I.C.A. taxes assessed for the Fourth Quarter of 1951. Taxpayer was ultimately adjudged a Bankrupt but said tax was not discharged. On May 13, 1958, final payment of said assessment $4,395.42, was made by Taxpayer. Said payment was made by the crediting to the delinquent account a refund determined to be due Taxpayer for income taxes of a year subsequent to his adjudication as a Bankrupt. Concurrently with the application of the refund to said delinquent account, the United States assessed accrued interest of $1,369.42, covering the entire period from the date of assessment (January 31, 1952) to the date of payment (March 13, 1958), after giving proper credit for payments made on account.

Said assessment of accrued interest is unlawful for the reason that the United States is not entitled to interest on their claim after the filing of the Petition in Bankruptcy. United States is entitled to interest for the period from January 31, 1952 to July 1, 1953, which amount is the sum of $373.61. Balance of interest assessed against Taxpayer or $995.81, is properly refundable to Taxpayer.

[fol. 11]

EXHIBIT B TO FIRST AMENDED COMPLAINT

U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
DISTRICT DIRECTOR
U. S. Post Office & Court House Bldg.
Pittsburgh 30, Pa.

November 23, 1959

IN REPLY REFER TO
C:D:S:—FPD

Paul F. Bruning
c/o James G. Marks, Jr.
1707 Oliver Building
Pittsburgh, Pa.

(IN RE: CLAIM FOR REFUND OF
($995.81
(FOR THE PERIOD
(WT-FIC—4th Qu. 1951

Dear Sir:

In accordance with the provisions of existing internal revenue laws, this notice of disallowance in full of your claim or claims is hereby given.

No suit or proceeding in any court for the recovery of any internal revenue tax, penalty, or other sum which is a part of the claim for which this notice of disallowance is issued, may be begun after the expiration of two years from the date of mailing of this letter.

Very truly yours,

JOHN H. BINGLER
John H. Bingler
District Director

[fol. 12]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 561-60 WB Civil

[Title omitted]

ANSWER TO FIRST AMENDED COMPLAINT—
Received September 2, 1960

Comes Now the defendant, United States of America, and in answer to the first amended complaint, admits, denies, and alleges as follows:

1. Admits the allegations contained in paragraph I, except denies that the said interest was either wrongfully or erroneously or illegally collected from the plaintiff by the defendant.

[fol. 13] 2. Admits the allegations contained in paragraph II thereof.

3. Admits the allegations contained in paragraph III thereof.

4. Admits the allegations contained in paragraph IV, except that said assessment was made on April 22, 1952, rather than January 31, 1952.

5. Admits the allegations contained in paragraph V thereof.

6. Admits the allegations contained in paragraph VI thereof.

7. Admits the allegations contained in paragraph VII thereof.

8. Admits the allegations contained in paragraph VIII thereof.

9. Denies the allegations contained in paragraph IX thereof and "Exhibit A" attached thereto, except that

plaintiff on June 22, 1959, filed a claim for refund of $995.81, representing interest assessed against plaintiff with respect to the assessment of Withholding and FICA taxes of $4,395.42. All allegations contained in said "Exhibit A" are denied, except insofar as they are specifically admitted in this answer.

10. Admits the allegations contained in paragraph X thereof.

[fol. 14] 11. Denies the allegations contained in paragraph XI, except admits that no part of said sum of $995.81 collected from plaintiff by defendant has been repaid, credited, or refunded to plaintiff or to anyone for his use.

Wherefore, defendant prays that the plaintiff take nothing by his action, that the first amended complaint be dismissed with prejudice, and defendant have its costs in its behalf expended.

Laughlin E. Waters, United States Attorney, Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, Edward R. McHale, Attorneys for Defendant, United States of America.

[fol. 15]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 561-60 WB Civil

[Title omitted]

PRE-TRIAL ORDER—December 19, 1960
(Local Rule (9)(j))

Following pre-trial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this Court, It Is Ordered:

I. This is an action for:

(A) The recovery of interest paid on Federal Withholding and FICA taxes, alleged by the plaintiff to have been illegally and erroneously collected from him by the defendant on March 13, 1958, which interest accrued for the period after plaintiff filed a petition in bankruptcy.

[fol. 16] (B) The action is based on a claim for refund filed by the plaintiff with defendant on June 22, 1959, which was disallowed by the defendant on November 23, 1959.

(C) The issues are raised by the First Amended Complaint and the Answer to the First Amended Complaint.

II. Federal jurisdiction is invoked on the ground:

(A) Plaintiff alleges the illegal and erroneous collection of interest from him on March 13, 1958; the filing of a claim for refund therefor with the defendant on June 19, 1959; the disallowance by defendant of said claim for refund on November 23, 1959; and the plaintiff filed a first amended complaint for the recovery of

said interest in the sum of $995.81, in the United States District Court for the Southern District of California on June 27, 1960.

(B) Jurisdiction is conferred on this Court by Section 1346(a)(1) of Title 28, U. S. Code.

(C) At the time of filing the First Amended Complaint on June 27, 1960, in the Southern District of California, and at the time of the making of personal service of summons and first amended complaint upon defendant, the plaintiff was an individual residing in the City of Altadena, County of Los Angeles, State of California, within the Southern District of California, Central Division.

[fol. 17] III. The following facts are admitted, and require no proof:

(A) Plaintiff Paul F. Bruning, doing business in Louisiana as Bruning Construction Co., sometimes herein referred to as "taxpayer," incurred Withholding and FICA taxes for the fourth quarter 1951, in the sum of $4,169.15; said taxes were neither paid when due on January 31, 1952, nor was a return therefor timely filed.

(B) A delinquent Employer's Quarterly Federal Tax Return was filed by the taxpayer on February 13, 1952 showing said tax liability unaccompanied by any payment.

(C) On March 3, 1952, said tax of $4,169.15, together with a statutory addition to the tax of five per cent, $208.46, for late filing, and interest of $17.81 was assessed against the taxpayer in the sum of $4,395.42.

(D) Notice and demand for the payment of said assessment was made upon the taxpayer on March 20, 1952, and on June 2, 1952 a Notice of Tax Lien for said tax was filed with the Clerk of Acadia Parish, Crowley, Louisiana as No. 8311.

(E) With respect to said assessment, the taxpayer made the following payments prior to bankruptcy:

October	20, 1952	$886.05
April	6, 1953	300.00
May	18, 1953	100.00

[fol. 18] (F) On July 6, 1953, a voluntary petition in bankruptcy under Chapters I to VII of the Bankruptcy Act was filed by the taxpayer in the Western District of Louisiana, Docket No. 7240, and he was adjudicated a bankrupt on the same day.

(G) On January 11, 1954, the District Director of Internal Revenue at New Orleans, Louisiana, filed a claim in said bankruptcy for said assessment, together with other taxes not material herein.

(H) In said bankruptcy proceedings, no dividend was paid to the general creditors, and payment of a dividend on priority claims, including taxes, was prorated. The United States received a distribution in the sum of $701.32, from the bankruptcy estate on July 10, 1956, which was applied to said assessment.

(I) On October 29, 1953 the taxpayer was granted a discharge in bankruptcy.

(J) The Bankruptcy Court closed the case on June 29, 1954.

(K) The taxpayer filed claims for refund of his income taxes paid for the calendar year 1953 on February 11, 1957, and for the calendar year 1954 on May 10, 1957. Subsequently, said claims for refund of income taxes were audited and taxpayer was allowed a net operating loss which gave rise to a deduction, and thus, a credit of $857.55 of income taxes and [fol. 19] interest paid for the year 1953, and

$3,382.62 of income taxes and interest paid for the year 1954.

(L) On March 7, 1958, the Director of Internal Revenue at Pittsburgh, Pennsylvania, scheduled said credits and applied the $857.55 of the 1953 income tax overpayment, and $2,919.92 of the 1954 income tax overpayment, against the balance of said assessment of Withholding and FICA taxes for the fourth quarter 1951 plus accrued interest and additions to tax computed to that date (the balance of said credit for 1954 income taxes was applied against other liabilities of the plaintiff and is not in issue here).

(M) Of the sum of $3,777.47 thus applied by the District Director on March 7, 1958 against the assessment for Withholding and FICA taxes for the fourth quarter 1951 and the interest and additions thereto, the sum of $40.40 was incorrectly so applied and is admitted and conceded by defendant to be an overpayment.

(N) The interest which accrued on the balance of the assessment, from July 6, 1953, the date of the filing of petition in bankruptcy, to March 7, 1958, the date of payment by scheduling the credits for overassessments of income taxes and interest, is $795.40.

(O) The amount of interest which accrued on the sum of $701.32, the dividend paid from the [fol. 20] bankruptcy estate on July 10, 1956, between July 6, 1953, the date of filing the petition, and said date of payment is $125.74.

(P) On June 22, 1959, plaintiff filed a claim for refund of the interest of $995.81 he claimed was unlawfully accrued and assessed on the aforesaid assessment of Withholding and FICA taxes for the fourth quarter 1951 between the date of bankruptcy and the date of payment.

The claim for refund was disallowed on November 23, 1959, and this action was commenced within two years thereafter.

(Q) The overassessments of income taxes for the calendar years 1953 and 1954, which taxes did not become due until March 15, 1954, and April 15, 1955, respectively, were not the property of the bankrupt at the time of filing and adjudication of bankruptcy.

IV. The reservations as to the facts recited in paragraph III above are as follows:

(A) Plaintiff admits the computations set forth in paragraphs III(N) and III(O) are correct, but denies that as a matter of law interest in those amounts accrued in the periods shown therein.

V. There are no facts in the category of not admitted but not to be contested at the trial by evidence to the contrary.

[fol. 21] VI. There are no issues of fact remaining to be litigated upon the trial.

VII. There are no exhibits to be offered at the trial except this Pre-Trial Conference Order containing the stipulations of facts of the parties.

VIII. The following issues of law, and no others, remain to be litigated upon the trial.

(A) Whether interest of $795.40 accrued on the balance of the assessment of Withholding and FICA taxes between the date of filing of the petition in bankruptcy and the date of payment after bankruptcy, and was legally collected from the taxpayer's own assets acquired by him after filing his petition in bankruptcy.

(B) In the alternative, whether interest of $125.74 accrued on that portion of the assessment of

Withholding and FICA taxes satisfied by the bankruptcy dividend of $701.32, between the date of filing of the bankruptcy petition and the date of payment by the bankruptcy estate of said dividend, and was legally collected from the taxpayer's own assets acquired by him after filing his petition in bankruptcy.

IX. The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this order shall supplement the pleadings [fol. 22] and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

Dated: December 19, 1960.

William M. Byrne, United States District Judge.

Approved as to Form and Content

Ernest R. Mortenson, Attorney for Plaintiff.

Laughlin E. Waters, United States Attorney, Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, Edward R. McHale, Attorneys for Defendant.

[fol. 23] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 561-60 WB

PAUL F. BRUNING, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

MEMORANDUM OF DECISION—Filed April 10, 1961

Plaintiff incurred liability for withholding and Social Security taxes as an employer for the fourth quarter of the

year 1951, but failed to pay more than a portion of this liability. On July 6, 1953, he filed a voluntary petition in bankruptcy and was on the same day adjudicated a bankrupt. The District Director of Internal Revenue filed a claim in the bankruptcy proceedings for the delinquent taxes. No dividend was received by the general creditors in the bankruptcy proceedings and the dividend received by the defendant on its priority claim for taxes was only a fraction of the assessed amount. Plaintiff was granted a discharge in bankruptcy on October 29, 1953.

[fol. 24]. In 1957 plaintiff filed claims for the refund of his income taxes paid for the years 1953 and 1954. These claims were audited and plaintiff was allowed a net operating loss which gave rise to a deduction and thus a credit for income taxes and interest paid for the years 1953 and 1954.

On March 7, 1958, the Director of Internal Revenue applied the entire 1953 credit and a part of the 1954 credit against the balance of the assessment of the withholding and FICA taxes for the fourth quarter of 1951 plus accrued interest and additions to tax computed to that date. Of the amount so applied, a portion was allotted to the interest and additions to taxes accrued to that date. (Defendant concedes errors in the computation of interest which will give plaintiff an overpayment of $40.40 in any event.) The amount of interest which had accrued during the period between the filing of petition in bankruptcy on July 6, 1953, and the date of credit March 7, 1958, was $795.40, and is the amount involved in this action.

The plaintiff has satisfied all jurisdictional prerequisites to this suit for refund, having paid the post-petition interest, filed a claim for refund, and the refund having been denied.

The question for determination is whether interest on delinquent taxes claimed in the bankruptcy estate accrues after the filing of a petition in bankruptcy and is collectible from the taxpayer himself, who is discharged in bankruptcy. [fol. 25] Both parties agree that such interest does not accrue on the claim *against the estate*. The narrow question presented is whether the interest may be collected from the taxpayer himself, by resorting to after-acquired assets or property exempt from the bankruptcy proceedings.

Plaintiff relies on the case of *City of New York* vs. *Saper*, 336 U. S. 328, 69 S. Ct. 554, 93 L. Ed. 710, where the Supreme Court held that tax claims against a *bankruptcy estate* bear interest only until the date of bankruptcy, not until payment. The Court's rationale appears at pages 330-332 of 336 U. S.:

> "... More than forty years ago Mr. Justice Holmes wrote for this Court that the rule stopping interest at bankruptcy had then been followed for more than a century and a half. He said the rule was not a matter of legislative command or statutory construction but, rather, a fundamental principle of the English bankruptcy system which we copied. Sexton v. Dreyfus, 219 U. S. 339, 344. Our present statute contains no provision expressly repudiating that principle or allowing an exception in favor of tax claims. Every [fol. 26] logical implication from relevant provisions is to the contrary. Section 63(a)(1), 11 U.S.C. §103(a)(1) allows interest on judgments only to date of bankruptcy. Section 63(a)(5), 11 U.S.C. §103(a)(5) allows interest only to that date on debts reduced to judgment after bankruptcy. No provision permits post-bankruptcy interest on other claims in general or tax claims in particular. Section 57(j), 11 U.S.C. §93(j), forbidding allowance of government penalties for forfeitures, permits allowance of losses sustained by the acts penalized, with actual costs and 'such interest as may have accrued thereon according to law'. However, on its face this appears to delimit even such allowable debts as of the date of bankruptcy and to allow no more interest than does §63 with respect to the claims there specified. Moreover, there is no interest except that which accrues according to law—it is exactly such interest that the 'fundamental principle' cuts off as of bankruptcy. Section 57(n), 11 U.S.C. §93(n) requires governmental claims to be proved in the same manner [fol. 27] and within the same time as other debts and only for cause shown may a reasonable extension be granted. Tax claims are treated the same as other debts except for the fourth priority of payment, §64(a),

11 U.S.C. §104(a), and the provision making taxes nondischargeable, §17, 11 U.S.C. §35. But each of these sections is silent as to interest.

"The long-standing rule against post-bankruptcy interest appears implicit in our current Bankruptcy Act. To read into such a statute an exception to that rule would be unwarranted and, as an original proposition, we should decline to do so . . . ."

The plaintiff's reliance appears misplaced, as the question here at issue was not considered in the *Saper* case, which involved interest on an unliened tax claim of the City of New York which the City attempted to collect from the *bankruptcy estate*, not from the taxpayer. The instant case concerns the liability of the taxpayer himself for such interest when collected from the taxpayer's assets acquired *after bankruptcy*. The *Saper* principle that tax claims against a bankrupt bear interest only until the date of bankruptcy, not until payment, has been applied by three [fol. 28] Circuit Courts including our own, (*U. S.* vs. *Bass*, 271 F. 2d 129 (CA 9); *U. S.* vs. *Harrington*, 269 F. 2d 719 (CA 4); *In re Kerber Packing Co.*, 276 F. 2d 245 (CA 7)) and is the settled law, but it is not dispositive of this case.

The Tenth Circuit case of *U. S.* vs. *Mighell*, 273 F. 2d 682, would seem to support the plaintiff's position, as it affirmed the right of the lower court to enjoin the collection of post-petition interest on lien claims from the debtor himself after his discharge. In citing *U. S.* vs. *Bass*, supra, and *U. S.* vs. *Harrington*, supra, the *Mighell* court stated, "This contention of the United States has been rejected and post-bankruptcy interest on liened tax claims denied. As we agree with those decisions, no good purpose would be gained by going over the same ground that they have covered adequately."

This conclusion rests, I believe, on a wholly unwarranted dependence on *Bass* and *Harrington*. It disregards the only issue that was before the court in each of those cases, and thereby misconceives the holding in each. Both *Bass* and *Harrington* were concerned with the issue of the *obligation of the bankruptcy estate* for post-petition interest on tax claims sought to be *proved and allowed in the estate*.

It is true that both courts denied "post-bankruptcy interest on liened tax claims", but it was interest sought to be allowed and *collected from the estate,* not from the tax- [fol. 29] payer. These courts both followed the Supreme Court holding in the *Saper* and *Dreyfus* cases that inherent in our bankruptcy law is a fundamental principle, taken from the English system, *viz.* the cutting off of interest *against the estate* at the time of bankruptcy. It does not follow that this interest may not be collected from the taxpayer after his discharge in bankruptcy when the other creditors are unaffected.

It is clear from *Bass* and *Harrington,* as well as *Saper* and *Dreyfus,* that the phrases "everything stops at a certain date", "interest cut off as of bankruptcy", relate to the obligations of the *bankruptcy estate* and not to those of the taxpayer. For example, if the estate turns out to be solvent and there is a surplus after the payment of all creditors' claims, the surplus *is applied to creditors' claims for interest,* and not returned to the debtor. See also *Beecher* vs. *Leavenworth State Bank,* 192 F. 2d 10 (CA 9) to the same effect. That the purpose of the "cut off" rule is to preserve the estate is made manifest by the *Beecher* court in stating, "There is just as much danger of *eating up the bankrupt's estate* with interest on claims arising after the date of bankruptcy as with interest on claims arising before the date of bankruptcy. Consequently, the allowance of interest on these supplemental claims must be modified in the same manner as the other secured claims." (emphasis supplied)

[fol. 30] The *Saper* case (336 U.S. at page 338) cited *American Iron Co.* vs. *Seaboard Air Line,* 233 U.S. 261, as stating the correct rule. The latter case held (233 U.S. at pages 266, 267) that the rule stopping interest from accruing against the estate "did not prevent the running of interest" and cited with approval *Johnson* vs. *Norris,* 190 F. 459, where the court stated at page 463, "It is true, as a general rule, that, where property of an insolvent passes into the hands of the court, subsequently accruing interest is not allowed against the fund (citing case). This principle is applied *as between creditors claiming the fund.*" (emphasis supplied)

The Internal Revenue Code of 1939 governs the liability for interest on taxes[1] and provides that in case of delinquency there *shall be added as part of the tax,* interest at the rate of six per centum per annum from the date the tax became due until paid. The Code provides that a lien arises with respect to any delinquent tax, that it includes interest and "shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time".[2]

The Bankruptcy Act expressly excepts taxes from discharge[3] and the clear language of the revenue statute *adds* [fol. 31] *interest to the tax.* The result is that interest added to the tax is excepted from discharge. There is nothing in the Bankruptcy Act, the Internal Revenue Code or the "fundamental principle of the English bankruptcy system" which should compel or permit a contrary conclusion.

Dated April ..... 1961.

Wm. M. Byrne, United States District Judge.

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[1] §§ 1623, 1627, 1420(b).

[2] §§ 3670, 3671.

[3] § 17 (11 U.S.C.A. 35).

[fol. 32] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
No. 561-60 WB Civil

PAUL E. BRUNING, Plaintiff,
v.
UNITED STATES OF AMERICA, Defendant

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT
—April 19, 1961

The above-entitled case came on regularly for trial on March 20, 1961, at 2:00 P.M., before the Honorable Wm. M. Byrne, United States District Judge, presiding without a jury, plaintiff represented by his attorney, Ernest R. Mortenson, Esq., the defendant by its attorneys, Laughlin E. Waters, United States Attorney, and Edward R. McHale, [fol. 33] Assistant United States Attorney, Chief, Tax Division, and the Court, having considered the stipulated evidence contained in the Pre-Trial Order of December 19, 1960, the briefs and oral arguments of the parties, and having filed herein on April 10, 1961 its Memorandum of Decision, now finds as follows:

Findings of Fact

1. This is an action for the recovery of interest paid on Federal Withholding and FICA taxes, alleged by the plaintiff to have been illegally and erroneously collected from him by the defendant on March 13, 1958, which interest accrued for the period after plaintiff filed a petition in bankruptcy.

2. The action is based on a claim for refund filed by the plaintiff with defendant on June 22, 1959, which was disallowed by the defendant on November 23, 1959.

3. Federal jurisdiction was invoked on the grounds:

a. Plaintiff alleged the illegal and erroneous collection of interest from him on March 13, 1958; the filing of a claim for refund therefor with the defendant on June 19, 1959; the disallowance by defendant of said claim for refund on November 23, 1959; and the plaintiff filed a first amended complaint for the recovery of said interest in the sum of $995.81, in the United States District Court for the Southern District of California on June 27, 1960.

[fol. 34] b. Jurisdiction is conferred on this Court by Section 1346(a)(1) of Title 28, U. S. Code.

c. Plaintiff commenced this action by the filing of a complaint in the United States District Court for the Western District of Pennsylvania, which Court transferred the action to the United States District Court for the Southern District of California, Central Division, because plaintiff was a resident of this district. At the time of filing the First Amended Complaint on June 27, 1960, in the Southern District of California, and at the time of the making of personal service of summons and first amended complaint upon defendant, the plaintiff was an individual residing in the area of Altadena, County of Los Angeles, State of California, within the Southern District of California, Central Division.

4. Plaintiff Paul F. Bruning, doing business in Louisiana as Bruning Construction Co., sometimes herein referred to as "taxpayer", incurred Withholding and FICA taxes for the fourth quarter 1951, in the sum of $4,169.15; said taxes were neither paid when due on January 31, 1952, nor was a return therefor timely filed.

5. A delinquent Employer's Quarterly Federal Tax Return was filed by the taxpayer on February 13, 1952 showing said tax liability unaccompanied by any payment.

[fol. 35] 6. On March 3, 1952, said tax of $4,169.15, together with a statutory addition to the tax of five per cent, $208.46, for late filing, and interest of $17.81 was assessed against the taxpayer in the sum of $4,395.42.

7. Notice and demand for the payment of said assessment was made upon the taxpayer on March 20, 1952, and on June 2, 1952 a Notice of Tax Lien for said tax was filed with the Clerk of Acadia Parish, Crowley, Louisiana as No. 8311.

8. With respect to said assessment, the taxpayer made the following payments prior to bankruptcy:

October 20, 1952	$866.05
April 6, 1953	300.00
May 18, 1953	100.00

9. On July 6, 1953, a voluntary petition in bankruptcy under Chapters I to VII of the Bankruptcy Act was filed by the taxpayer in the Western District of Louisiana, Docket No. 7240, and he was adjudicated a bankrupt on the same day.

10. On January 11, 1954, the District Director of Internal Revenue at New Orleans, Louisiana, filed a claim in said bankruptcy for said assessment, together with other taxes not material herein.

11. In said bankruptcy proceedings, no dividend was paid to the general creditors, and payment of a dividend on priority claims, including taxes, was prorated. The United [fol. 36] States received a distribution in the sum of $701.32, from the bankruptcy estate on July 10, 1956, which was applied to said assessment.

12. On October 29, 1953 the taxpayer was granted a discharge in bankruptcy.

13. The Bankruptcy Court closed the case on June 29, 1954.

14. The taxpayer filed claims for refund of his income taxes paid for the calendar year 1953 on February 11, 1957, and for the calendar year 1954 on May 10, 1957. Subsequently, said claims for refund of income taxes were audited and taxpayer was allowed a net operating loss which gave rise to a deduction, and thus, a credit of $857.55 of income taxes and interest paid for the year 1953, and $3,382.62 of income taxes and interest paid for the year 1954.

15. On March 7, 1958, the Director of Internal Revenue at Pittsburgh, Pennsylvania, scheduled said credits and applied the $857.55 of the 1953 income tax overpayment, and $2,919.92 of the 1954 income tax overpayment, against the balance of said assessment of Withholding and FICA taxes for the fourth quarter 1951 plus accrued interest and additions to tax computed to that date (the balance of said credit for 1954 income taxes was applied against other liabilities of the plaintiff and was not in issue here).

16. Of the sum of $3,777.47 thus applied by the District Director on March 7, 1958 against the assessment for With- [fol. 37] holding and FICA taxes for the fourth quarter 1951 and the interest and additions thereto, the sum of $40.40 was incorrectly so applied and is admitted and conceded by defendant to be an overpayment.

17. The interest which accrued on the balance of the assessment, from July 6, 1953, the date of the filing of petition in bankruptcy, to March 7, 1958, the date of payment by scheduling the credits for overassessments of income taxes and interest, is $795.40.

18. The amount of interest which accrued on the sum of $701.32, the dividend paid from the bankruptcy estate on July 10, 1956, between July 6, 1953, the date of filing the petition, and said date of payment, is $125.74.

19. On June 22, 1959, plaintiff filed a claim for refund of the interest of $995.81 he claimed was unlawfully accrued and assessed on the aforesaid assessment of Withholding and FICA taxes for the fourth quarter 1951 between the date of bankruptcy and the date of payment. The claim for refund was disallowed on November 23, 1959, and this action was commenced within two years thereafter.

20. The overassessments of income taxes for the calendar years 1953 and 1954, which taxes did not become due until March 15, 1954, and April 15, 1955, respectively, were not the property of the bankrupt at the time of filing and adjudication of bankruptcy.

[fol. 38] 21. Neither the filing of the petition in bankruptcy, the adjudication of plaintiff as bankrupt, nor his

discharge in bankruptcy affected, postponed, diminished or discharged his liability for interest in the sum of $745.90 on the taxes due the United States, and they were properly and legally collected from him by the defendant.

22. Plaintiff has overpaid interest on the assessment of taxes herein involved only in the conceded sum of $40.40 and is entitled to a judgment of refund thereof together with interest thereon as provided by law and for his costs.

And from the foregoing facts, the Court concludes as follows:

Conclusions of Law

1. The Court has jurisdiction of the parties and the subject matter of the controversy.

2. Interest on taxes is added as a part of the tax at the rate of six per centum per annum from the date the tax becomes due until paid.

3. Taxes due the United States are expressly excepted from discharge in bankruptcy and this includes as well interest which is added as a part of the tax.

4. Interest of $795.40 accrued on the balance of the assessment of withholding and FICA taxes between the date of filing plaintiff's petition in bankruptcy and March 7, [fol. 39] 1958, the date of scheduling credits against said liability after bankruptcy.

5. Said accrued interest of $795.40 was legally and properly collected by defendant from taxpayer's own assets acquired by him after filing his petition in bankruptcy.

6. Plaintiff overpaid interest in the conceded amount of $40.40 only and is entitled to judgment of a refund thereof, together with interest thereon from March 7, 1958, as provided by law, and for his costs.

Judgment

In accordance with the foregoing findings of fact and conclusions of law, it is ordered, adjudged and decreed that plaintiff have judgment against defendant in the amount of

$40.40 together with interest on said sum at the rate of six per centum per annum from March 7, 1958 until a date preceding the issuance of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue, and for his costs in the sum of $..... to be taxed by the Clerk of the Court.

Dated: April 19, 1961.

William M. Byrne, United States District Judge.

[fol. 40] 1. Approved as to form.

2. Disapproved as to form,

3. Receipt is acknowledged of copy of the within document this 13th day of April, 1961, at 1:00 P. M.

Ernest R. Mortenson, Attorney for Plaintiff.

[fol. 41]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 561-60-WB-Civil

[Title omitted]

NOTICE OF APPEAL—June 5, 1961

Notice is hereby given that Paul F. Bruning, the plaintiff, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 19, 1961.

Dated: 5th day of June, 1961.

Ernest R. Mortenson, Attorney for Plaintiff.

[fol. 42]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
No. 561-60-WB Civil

[Title omitted]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL—Filed June 14, 1961

Plaintiff-Appellant, Paul F. Bruning, herewith sets forth a concise statement of the points on which he intends to rely on appeal, viz:

I.

The District Court erroneously found and held that interest which accrued upon the Appellant's withholding and FICA taxes subsequent to the date of his filing a Petition [fol. 43] in Bankruptcy was properly collected from assets of the taxpayer acquired by him subsequent to the filing of his Petition in Bankruptcy.

Ernest R. Mortenson, Attorney for Plaintiff.

Dated: 14th day of June 1961.

[fol. 44] Designation of Contents of Record on Appeal—July 14, 1961 (omitted in printing).

[fol. 45] Attorney's Certification to Record (omitted in printing).

[fol. 47] Minute Entry of Argument and Submission—February 9, 1962 (omitted in printing).

[fol. 48] Minute Entry of Order Directing Filing of Opinion and Filing and Recording of Judgment—May 3, 1963 (omitted in printing).

[fol. 49]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17,445

PAUL F. BRUNING, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Southern District of California, Central Division

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OPINION—May 3, 1963

Before: Chambers and Barnes, Circuit Judges.[1]

Chambers, Circuit Judge:

Paul F. Bruning has been through bankruptcy. At adjudication one of his debts was to the United States for withholding and social security taxes for the fourth quarter of the year 1951. The government participated in the bankruptcy estate, but its claim was only partially satisfied on distribution.

Bruning is entitled to an income tax refund for later years unless the government can offset the refund by charging him post bankruptcy interest (that is, after adjudication). The case gets into court because Bruning has filed claims with the director of internal revenue for a refund which were denied.[2] So he sought in the district court to

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[1] John R. Ross, United States district judge for the District of Nevada, was the third member of the division which heard the arguments. His death occurred on April 22, 1963. Therefore, he has not participated in the decision herein.

[2] As of the date of adjudication of bankruptcy on July 6, 1953, the principal balance on the unpaid taxes was about $3,000.00. This was reduced by about $700.00 by a distribution in the estate.

obtain the money from the United States. This he was [fol. 50] denied by the district court. Bruning v. United States, 192 F. Supp. 826. Although it probably sets up a conflict with United States v. Mighell, 10 Cir., 273 F.2d 682, we choose to follow our trial court's decision.

Section 17 a. of the Bankruptcy Act (11 U.S.C. § 35 a.) provides as follows:

> "DEBTS NOT AFFECTED BY A DISCHARGE.—a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are due as a tax levied by the United States, or any State, county, district, or municipality; (2) are liabilities for obtaining money or property by false pretenses or false representations, or for willful and malicious injuries to the person of property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; or (5) are for wages which have been earned within three months before the date of commencement of the proceedings in bankruptcy due to workmen, servants, clerks, or traveling or city salesmen, on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; or (6) are due for moneys of an employee received or retained by his employer, to secure the faithful performance by such employee of the terms of a contract of employment."

Appellant Bruning does not question the director's right to deduct the principal balance from his refund. What is at issue in this case is the right of the director to deduct about $800.00 in post bankruptcy interest.

Obviously, under the above section insofar as the principal amount of tax debt was not satisfied out of the bankruptcy estate, the taxpayer would remain liable after his discharge.

[fol. 51] It is well settled that as between the tax collector and the bankrupt estate that interest is suspended[3] as of the time of adjudication, City of New York v. Saper, 336 U.S. 328; United States v. Bass, 9 Cir., 271 F.2d 719; and In Re Kerber Packing Co., 7 Cir., 276 F.2d 2[illegible] But if the estate is adequate and more to pay all claims which had accrued (including interest) as of the date of the bankruptcy then as between the debtor and the creditors, the latter get from the estate post bankruptcy interest. So even in the estate post bankruptcy interest is not gone for all purposes. American Iron Co. v. Seaboard Air Line, 233 U.S. 261; Brown v. Lee, 2 Cir., 34 F.2d 127.[4]

Some of the cases denying relief for the extra interest out of the estate do speak of compassion for the debtor or of what will restore the debtor's economic health. For example, see National Foundry Company of N.Y. v. Director of Internal Revenue, 2 Cir., 229 F.2d 149. But if paying interest on one's taxes after discharge is inimical to an ex-bankrupt's health, so is the payment of any balance of principal.

Section 17 a. is not a compassionate section for debtors. Congress, speaking for society, has decided that the problems of others: the government, the abandoned-dependent wife, the defrauded widow override the value of giving the debtor a wholly new start in life.

There is language in City of New York v. Saper, trustee, supra, which is favorable to appellant here, but we think the holding, based upon the internal arrangements of the bankruptcy estate, does not require us to reverse. Further, we believe our ruling consistent with our bankruptcy estate decision of United States v. Bass, supra.

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[3] One exception of course is negotiated security transactions. To the extent the security is adequate, interest is allowed against the res of the security during administration. Palo Alto Mutual Savings and Loan Ass'n v. Williams, 9 Cir., 1957, 247 F.2d 777.

[4] Provable claims in bankruptcy are covered by Section 63 of the Act (11 U.S.C. § 103).

This opinion need not be further continued to restate in a different way the published opinion of Bruning's case in the trial court cited hereinabove.

[fol. 52] Legislation is not our business. It may well be that with taxes reaching a position of dominance in the whole bankruptcy field, when the government gives away so much, it ought to give away after bankruptcy the interest on its taxes. Maybe Congress should say so clearly. But if we did so would we not give away the interest of him who was defrauded, the victim of the willful and brutal injury, those who lost by embezzlement? Perhaps we could waive the interest of the holders of judgment for breaches of promises to marry without too many qualms. But how could we choose among the beneficiaries of Section 17 a.? It must be admitted that taxes and more taxes so overshadow by general weight and burden the other protected debts of 17 a. and that in most cases to talk of the other nondischargeable debts is often theory. But the section was written on a day other than today.

Affirmed.

[File endorsement omitted]

[fol. 53]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17,445

PAUL F. BRUNING, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

JUDGMENT—May 3, 1963

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the

Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered May 3, 1963

[fol. 54] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 55]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1963

PAUL F. BRUNING, Petitioner,

vs.

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—August 2, 1963

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

September 2, 1963

Byron R. White, Associate Justice of the Supreme Court of the United States.

Dated this 2nd day of August, 1963

[fol. 56]

SUPREME COURT OF THE UNITED STATES

No. 423—October Term, 1963

PAUL F. BRUNING, Petitioner,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—November 18, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.